App. 1

United States Court of Appeals
for the Eighth Circuit

No. 19-2961

Lori Braun, As Administratrix of the
Estate of Cassandra Braun, deceased,
Individually and on Behalf of all Wrongful
Death Beneficiaries of, Cassandra Braun

Plaintiff - Appellant

v.

Brian Ray Burke, Trooper, Individually
as an Officer of the Arkansas State Police;
Bill Bryant, Colonel, Individually as the Chief
Executive Officer of the Arkansas State Police

Defendants - Appellees

Appeal from United States District Court for the
Eastern District of Arkansas – Little Rock

Submitted: September 22, 2020
Filed: December 23, 2020

Before COLLOTON, GRUENDER, and GRASZ, Circuit Judges.

GRUENDER, Circuit Judge.

The high-speed police pursuit of a speeding vehicle tragically ended with a car crash killing Cassandra Braun. Her mother (and estate administrator), Appellant Lori Braun ("Braun"), brought this case, alleging constitutional violations against the officer involved in the accident (Appellee Arkansas State Police Trooper Brian Burke) and his supervisor (Appellee Director of Arkansas State Police Bill Bryant). The district court[1] granted summary judgment for the Appellees on all claims. For the following reasons, we affirm.

I.

On the night of October 10, 2016, Trooper Burke was working a hit-and-run accident in a parking lot along Highway 70. While there, he saw a dark-colored sport utility vehicle ("SUV"), with flashing hazard lights, speed past. Trooper Burke estimated the SUV was traveling at ninety to ninety-five miles per hour in a fifty-five mile-per-hour zone. Less than two minutes later, Trooper Burke wrapped up the hit-and-run investigation, got into his police cruiser, and turned onto Highway 70 to pursue the SUV.

Although Trooper Burke initially activated his emergency lights and sirens, he turned them off roughly twenty seconds later. During the pursuit, his speed averaged over ninety miles per hour, peaking at

[1] The Honorable Billy Roy Wilson, United States District Judge for the Eastern District of Arkansas.

more than 110 miles per hour. In a later affidavit, Trooper Burke stated that he believed the SUV "posed a serious risk to the motoring public, thus creating a dangerous situation." "Believing that there was an emergently dangerous situation, [he] decided to try and stop the vehicle in order to end the risk to the public."

As Trooper Burke headed east on Highway 70 searching for the SUV, Cassandra Braun was a passenger in a car driving west on the same highway. Roughly eight miles from where Trooper Burke started, Cassandra Braun's car turned left, entering Burke's lane. Although Trooper Burke tried to stop his car, he was unable. The resulting crash killed Cassandra Braun and seriously injured Trooper Burke.

Braun brought this case under 42 U.S.C. § 1983, arguing Trooper Burke violated Cassandra Braun's substantive due process right to life under the Fourteenth Amendment. Braun further claimed that Director Bryant violated Cassandra Braun's rights by failing to properly train, supervise, or discipline Trooper Burke. The district court granted summary judgment for Appellees on all claims, finding no constitutional violations. Braun appeals.

II.

We review the district court's grant of summary judgment *de novo*, viewing the record in the light most favorable to, and drawing all reasonable inferences for, the nonmovant. *Jones v. Frost*, 770 F.3d 1183, 1185 (8th

Cir. 2014). "Summary judgment is proper when there is no genuine dispute of material fact and the prevailing party is entitled to judgment as a matter of law." *Id.*

To establish a substantive due process violation under the Fourteenth Amendment, Braun must show that Trooper Burke's conduct was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *See Terrell v. Larson*, 396 F.3d 975, 978 (8th Cir. 2005) (en banc).[2] In evaluating her substantive due process claim, we first must determine what level of culpability Braun must prove to demonstrate Burke's behavior was conscience shocking. *See id.* Negligence is never enough. *Id.* Deliberate indifference makes sense "only when actual deliberation is practical." *Id.* (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998)). But, typically—and especially in "rapidly evolving, fluid, and dangerous situations"—the plaintiff must show an intent to harm. *Id.* Here, Braun argues we should apply the deliberate indifference standard and implicitly concedes she cannot satisfy a higher standard. Conversely, Appellees argue we should require an intent to harm.

In *Lewis*, the Supreme Court held that the intent-to-harm standard applies when an officer is engaged in a high-speed chase of a suspect. 523 U.S. at 854. Expounding on this principle in *Terrell*, we extended the

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[2] Braun must also show the conduct violated a fundamental right, but we need not address that part of the inquiry here. *See Terrell*, 396 F.3d at 978 n.1.

intent-to-harm standard "to an officer's decision to engage in high-speed driving in response to other types of emergencies." 396 F.3d at 979. Whether an officer was responding to an "emergency" is a subjective, not objective, inquiry. *Id.* at 980. Accordingly, we will accept an officer's statement that he believed he was responding to an emergency unless it is "so preposterous as to reflect bad faith." *Sitzes v. City of W. Memphis*, 606 F.3d 461, 469 (8th Cir. 2010).

Here, Trooper Burke was pursuing an SUV traveling at night at a high speed with its hazard lights flashing. He estimated the SUV was traveling nearly 100 miles per hour, almost twice the fifty-five mile-per-hour speed limit. Crucially, Trooper Burke's affidavit states that he believed this was an "emergently dangerous" situation that "posed a serious risk to the motoring public." The affidavit further states that Trooper Burke believed his pursuit was necessary to end this dangerous situation. He thus believed he was responding to an emergency, triggering the intent-to-harm standard.

Braun's contrary arguments miss the mark. First, pointing to *Terrell* and *Sitzes*, she seems to suggest that our prior decisions extend the intent-to-harm standard only to situations where officers respond to an emergency *call*, not (presumably) emergencies officers witness themselves. Not so. Although the officers in *Terrell*, 396 F.3d at 977, and *Sitzes*, 606 F.3d at 464, were responding to emergency calls, we never suggested the way an officer learns of an emergency is crucial. Rather, and as the Supreme Court has explained,

the determining factor is the unavailability of "actual deliberation." *See Lewis*, 523 U.S. at 851. This might be present when an officer responds to an emergency call or when, as here, an officer witnesses an emergency firsthand.

Second, Braun asks us to reject as preposterous Trooper Burke's belief that the speeding SUV constituted an emergency because he finished his hit-and-run investigation and "saunter[ed]" to his car before pursuing the SUV. For one, Braun overstates the delay. Trooper Burke pursued the SUV less than two minutes after it raced past. *Cf. Terrell*, 396 F.3d at 977, 980 (applying the intent-to-harm standard to officers who received an emergency call while eating dinner, were ten miles from the emergency, and were twice told they were not needed). Regardless, we rejected this precise argument in *Sitzes*. 606 F.3d at 468 ("[T]he amount of time [an officer] had to deliberate on his actions is not, by itself, sufficient to render the intent-to-harm standard inapplicable."). Braun also claims that Trooper Burke's failure to use his emergency lights or siren for most of the pursuit shows he did not really believe this was an emergency. But, again, Braun's argument runs headlong into *Sitzes*. There, we held that an officer's failure to activate emergency lights or siren, while "arguably incompatible with a belief that he was responding to an emergency," was insufficient to overcome the officer's contrary affidavit. 606 F.3d at 469. So too here.

Indeed, our decision in *Sitzes* is generally instructive. There, an officer learned from a police dispatcher that someone had been assaulted and robbed of $55 in

a Wal-Mart parking lot. *Id.* at 464. The officer responded (even though another officer was already en route), driving at speeds of at least eighty miles per hour in a thirty mile-per-hour zone on the wrong side of the road. *Id.* We seriously doubted the parking lot heist constituted an actual emergency. *Id.* at 469. Still, we held that the officer's affidavit stating he believed he was responding to an emergency was not so preposterous as to reflect bad faith. *Id.* Even more so here, where the officer was facing an active threat to public safety, we are unwilling to find Trooper Burke's belief preposterous.

Finally, Braun insists that speeding does not constitute an actual emergency. This argument goes nowhere. Again, the emergency inquiry is a subjective, not objective, one.

In sum, Trooper Burke believed he was responding to an emergency, and thus we apply the intent-to-harm standard. This resolves Braun's claim against him, as she does not even argue, much less present any evidence, that he intended to harm anyone. Therefore, the district court correctly granted summary judgment for Trooper Burke on Braun's substantive due process claim because she failed to establish a constitutional violation.

Consequently, the district court also rightly granted summary judgment for Director Bryant. Braun's failure-to-train-or-supervise claim against Director Bryant requires an underlying constitutional violation. *White v. Jackson*, 865 F.3d 1064, 1076 (8th Cir. 2017);

Brockinton v. City of Sherwood, 503 F.3d 667, 673 (8th Cir. 2007). Because Braun's claim against Trooper Burke fails, so does her claim against Director Bryant.

For the foregoing reasons, we affirm.

COLLOTON, Circuit Judge, concurring.

I join the opinion of the court and submit these observations regarding the separate concurring opinion that follows.

In *Terrell v. Larson*, 396 F.3d 975 (8th Cir. 2005) (en banc), this court held that in determining the requisite level of culpability to prove a substantive due process claim against a law enforcement officer, there is no legally significant distinction between high-speed driving in pursuit of a suspect and high-speed driving in response to other types of emergencies. *Id.* at 978–979. The court rejected the use of an objective standard to determine whether a particular situation constitutes an emergency that triggers the "intent-to-harm" standard of fault that applies to highspeed pursuits under *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). Because "substantive due process liability is grounded on a government official's subjective intent, and because the intent-to-harm standard applies 'when unforeseen circumstances demand an officer's instant judgment' and 'decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance,' " the court ruled that "this issue turns on whether the deputies subjectively

believed that they were responding to an emergency." *Id.* at 980 (quoting *Lewis*, 523 U.S. at 853). The "intent-to-harm" standard thus applies to a substantive due process claim both when an officer believes that he is pursuing a suspect and when an officer believes that he is responding to another type of emergency. The suggestion of the concurrence, *post*, at 8, that there is a "legally significant" distinction between the two types of cases runs counter to *Terrell*.

More significantly, the concurrence asserts that our decision in this case "helps illustrate a growing circuit split" on the level of culpability required to establish a substantive due process claim. *Post*, at 9. The suggested conflict in authority, however, is illusory. In *Dean v. McKinney*, 976 F.3d 407 (4th Cir. 2020), the defendant officer acknowledged that an "emergency" call had been cancelled, and stated affirmatively that he was "backing down" to a non-emergency response. *Id.* at 415–16. At a minimum, there was a factual dispute about whether the officer believed in good faith that he was responding to an emergency. In *Sauers v. Borough of Nesquehoning*, 905 F.3d 711 (3d Cir. 2018), which involved a motion to dismiss a complaint, the officer allegedly observed only a "summary" or "minor" traffic offense, and then pursued the violator at over 100 miles per hour. *Id.* at 715–16. The complaint alleged that there was no emergency, and there was no allegation that the officer believed he was responding to an emergency. *Id.* at 718. Neither of the cited cases, therefore, applied a "deliberate indifference" standard of

fault in a case where it was undisputed that the officer believed he was responding to an emergency.

As for whether the outcome in this appeal "seems unjust," *post*, at 8, it is important to bear in mind the limited issue before this court. This case concerns only whether the plaintiff's evidence is sufficient to establish liability for a constitutional tort under the concept of substantive due process. We do not address whether the state trooper's actions were prudent as a matter of policy or whether such an officer should be liable for harm caused by reckless driving under traditional state tort law. The State of Arkansas is free to create a system of tort liability for law enforcement officers that could encompass the conduct at issue here, but the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976).

GRASZ, Circuit Judge, concurring.

I concur with the court's opinion. Precedent requires it. But if the outcome also seems unjust, I can understand why. Two people tragically died after a state trooper sped and endangered the public in order to try to locate a car previously seen speeding.

I write separately to address two points. One is a point of factual emphasis and the other is simply an observation related to the need for clarity in the

interest of public understanding as well as the preservation of respect for the rule of law.

First the point of factual emphasis. This is not a case involving a high-speed pursuit of a fleeing suspect. *Cf. Helseth v. Burch*, 258 F.3d 867, 871 (8th Cir. 2001) (en banc) ("We hold that the intent-to-harm standard of [*County of Sacramento v. Lewis*, 523 U.S. 833, 847–49 (1998)] applies to all § 1983 substantive due process claims based upon the conduct of public officials engaged in a high-speed automobile chase aimed at apprehending a suspected offender."). The facts, when viewed in the light most favorable to Braun, show that this was instead a hunt for a suspect whose whereabouts were unclear. That distinction is legally significant. It matters because when an officer is not in pursuit of a fleeing suspect, our precedent requires the district court to engage in an additional step: determining whether the officer subjectively believed he was responding to an "emergency." *See Terrell v. Larson*, 396 F.3d 975, 980 (8th Cir. 2005) (en banc) ("Under *Lewis*, the intent-to-harm culpability standard applies if they believed they were responding to an emergency call."). While that difference is important for future cases, the result here is the same. That is because no facts were presented to create a triable fact on the trooper's subjective belief under *Sitzes v. City of West Memphis*. *See Sitzes*, 606 F.3d 461, 469–70 (8th Cir. 2010) ("We do not understand this case to establish a per se rule that an officer's self-serving affidavit will always insulate that officer from substantive due process liability."). As a consequence, in this case we must

accept the trooper's affidavit stating he believed there was an emergency that required him, after concluding his work at the scene of a hit and run accident, to drive ninety-eight miles per hour on a public highway without emergency lights or sirens to try to locate a car he had earlier seen . . . speeding.

Now to the observation. This case helps illustrate a growing circuit split on when and how to apply the requisite level of culpability under *County of Sacramento v. Lewis*, 523 U.S. 833, 847–49 (1998). *Compare Dean v. McKinney*, 976 F.3d 407, 414–16 (4th Cir. 2020) (en banc) (looking at objective facts beyond the officer's subjective arguments to decide that deliberate indifference applied), *and Sauers v. Borough of Nesquehoning*, 905 F.3d 711, 715, 717–18 (3d Cir. 2018) (deciding that deliberate indifference applied after using objective factors to determine that no emergency existed), *with Bingue v. Prunchak*, 512 F.3d 1169 1176–78 (9th Cir. 2008) (applying an intent-to-harm standard), *and Terrell*, 396 F.3d at 980 ("[T]his issue turns on whether the deputies subjectively believed that they were responding to an emergency."). A uniform standard, or at least more clarity on when each standard applies, would advance respect for the rule of law in this area. This is especially true when, as here, there was time to deliberate before engaging in the high-speed driving that caused the accident and it was not a situation where the circumstances demanded an officer's instant judgment or a decision under pressure.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LORI BRAUN, as Administratrix of the Estate of Cassandra Braun, deceased, Individually and on Behalf of all Wrongful Death Beneficiaries of Cassandra Braun **PLAINTIFF**

VS. **4:18-cv-00334-BRW**

TROOPER BRIAN RAY BURKE, *ET AL.* **DEFENDANTS**

ORDER

(Filed Aug. 3, 2019)

Pending are Plaintiff's Motion for Summary Judgment (Doc. No. 51), Defendant's Motions for Summary Judgment (Doc. Nos. 54, 58). Responses and replies have been filed.[1] For the reasons set out below, Defendants' Motions for Summary Judgment (Doc. No. 54, 58) are GRANTED. Plaintiff's Motion for Summary Judgment (Doc. No. 51) is DENIED.

I. BACKGROUND[2]

After dark on October 10, 2016, Arkansas State Trooper Brian Burke was working a hit-and-run accident when a dark SUV with flashing hazard lights

[1] Doc. Nos. 65, 67, 71, 72, 76, 81, 82, 88, 89.

[2] Unless otherwise noted, the background is from the parties' statements of undisputed material facts. Doc. Nos. 53, 56, 60, 66.

passed him heading traveling at what appeared to be a high rate of speed. Trooper Burke finished the hit-and-run investigation, he pursued the speeding SUV in his patrol car. During the pursuit, Trooper Burke intermittently activated his sirens or lights and reached a top speed over 113 miles per hour. Cassandra Braun was on the same road as the SUV that Trooper Burke was pursuing. Her boyfriend, who was driving the car, was attempting to make a left hand turn when Trooper Burke collided with their vehicle. Ms. Braun and her boyfriend were killed from the collision.

On May 18, 2018, Plaintiff filed this case against Trooper Burke under 42 U.S.C. § 1983 and § 1988 for unreasonable seizure, excessive force, and violations of due process. Plaintiff also alleges that Defendant Bill Bryant, Director of the Arkansas State Police, was deliberately indifferent regarding the training, hiring, supervision, and discipline of Trooper Burke.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided on purely legal grounds.[3] The Supreme Court has established guidelines to assist trial courts in determining whether this standard has been met:

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[3] *Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987); Fed. R. Civ. P. 56.

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.[4]

The Court of Appeals for the Eighth Circuit has cautioned that summary judgment is an extreme remedy that should be granted only when the movant has established a right to the judgment beyond controversy.[5] Nevertheless, summary judgment promotes judicial economy by preventing trial when no genuine issue of fact remains.[6] A court must view the facts in the light most favorable to the party opposing the motion.[7] The Eighth Circuit has also set out the burden of the parties in connection with a summary judgment motion:

> [T]he burden on the party moving for summary judgment is only to demonstrate, i.e., "[to point] out to the District Court," that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and, if

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[4] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

[5] *Inland Oil & Transport Co. v. United States*, 600 F.2d 725, 727 (8th Cir. 1979).

[6] *Id.* at 728.

[7] *Id.* at 727-28.

> the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted.[8]

Only disputes over facts that may affect the outcome of the suit under governing law will properly preclude the entry of summary judgment.[9]

III. DISCUSSION

A. Defendant Brian Burke's Motion for Summary Judgment

Plaintiffs Fourth Amendment claim must fail because there is no allegation, or evidence, that Trooper Burke intended to seize Ms. Braun with his patrol car.[10] With no intent to seize, there was no seizure, which means there was no Fourth Amendment violation.

The Fourteenth Amendment claim must also fail. Even assuming, as Plaintiff contends, that there was not an emergency warranting Trooper Burke's high-speed pursuit, Plaintiff cannot establish a violation of

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[8] *Counts v. MK-Ferguson Co.*, 862 F.2d 1338, 1339 (8th Cir. 1988) (quoting *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-74 (8th Cir. 1988) (citations omitted)).

[9] *Anderson*, 477 U.S. at 248.

[10] *Moore v. Indehar*, 514 F.3d 756, 760 (8th Cir. 2008) ("Moore must show that Officer Indehar intended to seize Moore through the means of firing his weapon at Moore to establish a Fourth Amendment claim.").

due process. Plaintiff asserts that Trooper Burke's "driving in violation of the law in a non-emergency situation without lights and sirens" renders the intent-to-harm standard inapplicable. However, according to the Eighth Circuit, " 'the intent-to-harm standard . . . applies to all § 1983 substantive due process claims based upon the conduct of public officials engaged in a high-speed automobile chase aimed at apprehending a suspected offender,' regardless of whether the chase conditions arguably afforded pursuing officers time to deliberate."[11] The Eighth Circuit has rejected an argument nearly identical to Plaintiff's:

> First, we must reject plaintiffs' primary argument, which bases liability on the situation at Wal–Mart not being a "true" emergency. *Terrell* forecloses inquiry into the objective nature of the emergency, as substantive due process liability turns on the intent of the government actor. Thus, the fact that the situation at the Wal–Mart was not as serious as those presented in *Helseth* or *Terrell*, or that it might not qualify as an "emergency" under the WMPD Policy and Procedure manual, is not determinative of the appropriate level of scrutiny.[12]

Trooper Burke's affidavit asserts that he "believed that the SUV traveling at a high rate of speed with a likely untrained driver posed a serious risk to the

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[11] *Terrell v. Larson*, 396 F.3d 975, 977 (quoting *Helseth v. Burch*, 258 F.3d 867, 871 (8th Cir. 2001) (emphasis added)).

[12] *Sitzes v. City of W. Memphis Ark.*, 606 F.3d 461, 468 (8th Cir. 2010).

motoring public, thus creating a dangerous situation . . . [he] believed at the time that [he] was responding to a dangerous situation and that [he] needed to drive in the manner that [he] was driving."[13] His belief that the SUV was traveling at a high rate of speed is also supported by videos from surveillance cameras along the road.[14] A self-serving affidavit does not always insulate an officer from liability. However, a Court is required to take "at face value an officer's characterization of a situation as an emergency in all but the most egregious cases."[15] The only evidence Plaintiff presented to question Trooper Burke's subjective belief is the fact that he spent nearly an extra minute wrapping up with this hit-and-run and walked, rather than ran, to his patrol car before pursuing the SUV.[16] Without more, Plaintiff is unable to establish that Trooper Burke's subjective belief "is so preposterous as to reflect bad faith."[17] The intent-to-harm standard applies, and there is no evidence that Trooper Burke intended to harm the decedents. Accordingly, Trooper Burke is entitled to summary judgment.

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[13] Doc. No. 58-6.

[14] Doc. No. 58-9.

[15] *Sitzes*, 606 F.3d 469.

[16] Doc. No. 58-1.

[17] *Id.*

B. Defendant Bill Bryant's Motion for Summary Judgment

Because Plaintiff cannot establish an underlying constitutional violation, the causes of actions against Defendant Bryant must also be dismissed.[18]

CONCLUSION

Based on the findings of fact and conclusions of law above, Defendants' Motions for Summary Judgment (Doc. No. 54, 58) are GRANTED. Plaintiff's Motion for Summary Judgment (Doc. No. 51) is DENIED.

IT IS SO ORDERED this 30th day of August, 2019.

Billy Roy Wilson
UNITED STATES
DISTRICT JUDGE

[18] *White v. Jackson*, 865 F.3d 1064, 1076 (8th Cir. 2017) (affirming "dismissal of [the plaintiffs] § 1983 claim for failure to train, supervise, and discipline because he lacks an underlying substantive claim against the individual defendants.").

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2961

Lori Braun, As Administratrix of the Estate of Cassandra Braun, deceased, Individually and on Behalf of all Wrongful Death Beneficiaries of, Cassandra Braun

Appellant

v.

Brian Ray Burke, Trooper, Individually as an Officer of the Arkansas State Police and Bill Bryant, Colonel, Individually as the Chief Executive Officer of the Arkansas State Police

Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas - Little Rock
(4:18-cv-00334-BRW)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 01, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans